Supreme Court, U.S.
FILED
01 931 DEC 2 8 2001

CASE NO. _____

IN THE UNITED STATES SUPREME COURT
October Term 2001

THE STATE OF FLORIDA,
Petitioner,

vs.

SHELTON SCARLET,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MICHAEL J. NEIMAND
Assistant Attorney General
Florida Bar No. 0239437
Office of the Attorney General
110 S.E. 6th Street - 9th Floor
Ft. Lauderdale, Florida 33301
(954) 712-4600

4/4 pp

QUESTION PRESENTED

When evidence obtained by an unlawful search is excluded from the criminal trial of the charge the evidence relates to, does the exclusionary rule require the evidence be excluded in a probation revocation hearing which hearing is not a criminal trial?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES ..... iii-vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE AND FACTS 4

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 13

APPENDIX .....

Opinion, State v. Scarlet, Supreme Court of Florida, November 1, 2001 ..... A-1

Opinion, Scarlet v. State, District Court of Appeal of Florida, Third District, August 16, 2000 ..... A-8

Order Denying the Motion to Suppress, Circuit Court of the 11th Judicial Circuit of the State of Florida in and for Dade County, Dated October 25, 1999 ..... A-12

TABLE OF AUTHORITIES

CASES **PAGE**

Amiss v. State,
219 S.E.2d 28 (Ga. Ct. App. 1975). 8

Anderson v. Commonwealth,
470 S.E.2d 862 (Va. 1996). 8

Bernie v. State,
524 So.2d 988 (Fla. 1988) 9

Ex parte Caffie,
516 So.2d 831 (Ala. 1987). 8

Chase v. State,
522 A.2d 1348 (Md. 1987). 8

Commonwealth v. Olsen,
541 N.E.2d 1003 (Mass. 1989). 8

Dunlin v. State,
346 N.E.2d 746 (Ind. Ct. App. 1976). 8

Grubbs v. State,
373 So.2d 905 (Fla. 1979). 5,7

I.N.S. v. Lopez-Mendoza,
468 U.S. 448 (1984). 10

Kain v. State,
378 N.W.2d 900 (Iowa 1985). 8

Morrissey v. Brewer,
408 U.S. 471 (1972). 11

Panesenko v. State,
706 P.2d 273 (Wyo. 1985). 8

Payne v. Robinson,
541 A.2d 504 (Conn. 1988) 8

Pennsylvania Board of Probation & Parole v. Scott,
524 U.S. 357 (1998). 4,9,10,11

People v. Dowery,
340 N.E.2d 529 (Ill. 1975) 8

People v. Wilkerson,
541 P.2d 896 (Colo. 1975) 8

Perez v. State,
620 So.2d 1256 (Fla. 1993) 9

State ex rel. Wright v. Ohio Adult Parole Authority,
661 N.E.2d 728 (Ohio 1996) 8

State v. Alfaro,
623 P.2d 8 (Ariz. 1980) 8

State v. Cross,
487 So.2d 1056 (Fla. 1986) 5,7

State v. Davis,
375 So.2d 69 (La. 1979) 8

State v. Field,
571 A.2d 1276 (N.H. 1990) 8

State v. Foisy,
384 A.2d 42 (Me. 1978). 8

State v. Jarman,
987 P.2d 1284 (Utah Ct. App 1999) 8,12

State v. Kuhn,
499 P.2d 49 (Wash. Ct. App. 1972) 8

State v. Marquart,
945 P.2d 1027 (N.M. Ct. App. 1997) 9

State v. Martin,
595 N.W.2d 214 (Minn. Ct. App. 1999) 8,12

State v. Rogers,
836 P.2d 127 (Or. 1992) 9

State v . Scarlet,
26 Fla. L. Weekly S720 (Fla. Nov. 1, 2001) 1

State v. Sears,
553 P.2d 907 (Alaska 1976) 8

State v. Spratt,
386 A.2d 1094 (R.I. 1978) 8

State v. Thorsness,
528 P.2d 692 (Mont. 1974) 8

Tiryung v. Commonwealth,
717 S.W.2d 503 (Ky. Ct. App. 1986) 8

United States v. Armstrong,
187 F.3d 392 (4th Cir. 1999) 8,12

United States v. Bazzano,
712 F.2d 826 (3d Cir. 1983) 8

United States v. Calandra,
414 U.S. 338 (1974) 10

United States v. Farmer,
512 F.2d 160 (6th Cir. 1975) 8

United States v. Finney,
987 F.2d 1047 (10th Cir. 1990) 8

United States v. Frederickson,
581 F.2d 711 (8th Cir. 1978) 8

United States v. Hill,
447 F.2d 817 (7th Cir. 1971) 8

United States v. Janis,
428 U.S. 433 (1976) 10

United States v. Knights,
No. 00-1260 (U.S. Dec. 10, 2001) 11

United States v. Winsett,
518 F.2d 51 (9th Cir. 1975) 8

Unites States v. Brown,
488 F.2d 94 (5th Cir. 1973) 8

Wilson v. State,
621 S.W.2d 799 (Tex. Crim. App. 1981) 8

STATUTES

28 U.S.C. § 1257(a) 1

CASE NO: _____

IN THE UNITED STATES SUPREME COURT
October Term 2001

THE STATE OF FLORIDA,
Petitioner,

vs.

SHELTON SCARLET,
Respondent.

OPINIONS BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported at *State v . Scarlet*, So.2d , 26 Fla. L. Weekly S720 (Fla. Nov. 1, 2001). [A-1].[1] The decision of the District Court of Apppeal of Florida, Third District is reported at 766 So.2d 1110. [A-8]. The trial court's order denying the motion of Respondent, Shelton Scarlet's, to suppress the evidence is not reported. [A-12].

JURISDICTION

The Supreme Court of Florida's opinion was filed on November 1, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

---

[1] The symbol "A" followed by the appropriate number represents a citation to the materials contained in the Appendix to this pleading.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV, United States Constitution, provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause...

Amendment XIV, §I, United States Constitution, provides, in pertinent part:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law...

Article I, § 12, Florida Constitution, provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the communication to be intercepted, and the nature of the evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court

construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Shelton Scarlet, was the Respondent in the Supreme Court of Florida. The trial court placed Respondent on probation for a term of one year for burglary of an occupied dwelling. While on probation, an affidavit of violation of probation was filed charging the Respondent with committing the offense of trafficking in cocaine; failing to pay restitution; and failing to complete 100 hours of community service.
[A-9].

The cocaine charge emanated from a traffic stop. On that charge, the trial court found the search to be without probable cause, without founded suspicion, and without a warrant or consent. [A-9]. The trial court suppressed the cocaine and the Petitioner announced a *nolle prosequi* of the trafficking in cocaine case. [A-22].

At the probation violation hearing, however, the trial court admitted the seized cocaine on the ground that the exclusionary rule did not apply. The trial court's ruling was based on *Pennsylvania Board of Probation & Parole v. Scott*, 524 U.S. 357 (1998), where this Court held that exclusionary rule is inapplicable to parole revocation hearings since the exclusionary rule does not extend to proceedings other than criminal trials. The trial court, after finding that a probation revocation hearing is not a criminal trial, denied the motion to suppress. The court revoked Respondent's probation. [A-22]. Respondent was then sentenced to 54 months in state prison. [A-10].

The Respondent, Shelton Scarlet, appealed the suppression order to the District Court of Appeal of Florida, Third District. The Third District reversed the trial court's denial of the motion to suppress. The ruling was based on the Supreme Court of Florida's holding in *State v. Cross*, 487 So.2d 1056 (Fla. 1986), that in the absence of a controlling federal decision directly on point, evidence obtained through an unlawful search is inadmissible in a probation revocation hearing. The Third District, after acknowledging *Scott*, found that it was not controlling, even though parole revocation hearings and probation revocation hearings are not criminal trials, because, according to the Court, they are very different proceedings. Thus, the Third District held

that *Scott* does not overturn *Cross* and evidence discovered during an unlawful search is not admissible in a probation revocation hearing. [A-10-11].

The Supreme Court of Florida approved the Third District's decision and held that its prior decisions in *Grubbs v. State*, 373 So.2d 905 (Fla. 1979) and *State v. Cross*, 487 So.2d 1056 (Fla. 1986) were still good law and thus were controlling. *Grubbs* stands for the proposition that it is reasonable for a probation supervisor to search a probationer's person or living quarters to ensure that the probationer is not violating his probation. Although the Supreme Court of Florida authorized a reasonable search of probationers, it held that a warrant was required if the State wanted to use the lawfully seized evidence in any action other than the probation revocation hearing. *Cross* stands for the proposition that illegally seized evidence is inadmissible in probation revocation proceedings even after Florida's constitutional prohibition against unlawful searches and seizures was amended so its decisions would conform to those of this Court. The Supreme Court of Florida reasoned that since the United States Supreme Court had not yet ruled on the identical issue, it was free to decide the issue as it wished. [A-3].

Petitioner's position, that the *Scott* decision and the conformity clause of Article I, § 12 of the Florida Constitution required that the Third District's decision be disapproved and the trial court's denial of the motion to suppress be affirmed, was rejected by the Supreme Court of Florida. The conformity clause, which is emphasized below, provides:

> ***...This right shall be construed in conformity with the 4th Amendment to the United States Constitution as interpreted by the United States Supreme Court.*** Articles or information obtained in violation of this right shall not be admissible in evidence ***if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.***

Although the Court recognized that it was bound to follow the interpretations of this Court with respect to the Fourth Amendment, the Supreme Court of Florida felt free to disregard this Court's prior precedents in this area. The basis for this decision was that this Court had not yet rendered a decision, both legally and factually, directly on point which overruled both *Grubbs* and *Cross*. [A-1-3].

The dissent concluded that the majority failed to follow the unequivocal mandate of conformity clause of Article I, § 12 of the Florida Constitution. The dissent recognized that this Court in *Scott*, by reaffirming its prior precedents, declined to extend the operation of the exclusionary rule beyond the criminal trial context to parole revocation hearings. Since it is beyond dispute that a probation revocation hearing is not a criminal trial, the dissent would have followed *Scott* and held that the exclusionary rule does not extend to a probation revocation hearing. The dissent concluded by stating, "I do not believe that this Court has the choice of which United States Supreme Court decisions it will follow and which it will not." [A-4-6].

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW THAT THE EXCLUSIONARY RULE EXTENDS TO A PROCEEDING OTHER THAN A CRIMINAL TRIAL, A PROBATION REVOCATION HEARING, CONFLICTS WITH DECISIONS OF THIS COURT, DECISIONS OF UNITED STATES COURTS OF APPEAL AND DECISIONS OF APPELLATE COURTS OF THE OTHER STATES.

The Respondent, Shelton Scarlet, while on probation for a prior conviction of burglary of an occupied dwelling, was lawfully stopped for a traffic infraction. During the course of the traffic stop, the police officer searched Respondent's vehicle and found cocaine. The Respondent was charged with trafficking in cocaine. An affidavit of violation of probation was also filed charging the Respondent with violating his condition of probation that he live and remain at liberty without violating the law by committing the offense of trafficking in cocaine.

Prior to trial, the Respondent filed a motion to suppress the cocaine. The trial court found that the police officer did not have probable cause, founded suspicion or consent to search Respondent's vehicle. On the substantive charge of trafficking in cocaine the trial court suppressed the cocaine and Petitioner then dismissed the charges. However, at the probation revocation hearing the trial court admitted the cocaine on the ground that the exclusionary rule did not apply since a probation revocation hearing is not a criminal trial.

On appeal the Supreme Court of Florida approved the intermediate appellate court's decision which reversed the trial court and held that the exclusionary rule does apply to probation revocation proceedings. The Court's decision was based on its prior decisions in *State v. Cross*, 487 So.2d 1056 (Fla. 1986) (in the absence of a controlling federal decision directly on point, evidence obtained through an unlawful search is inadmissible in a probation revocation hearing) and *Grubbs v. State*, 373 So.2d 905 (Fla. 1979) (cocaine that

was lawfully seized during the probation search was only admissible in the probation revocation hearing and not in the trial on the possession of cocaine charge).

Petitioner requested that the Supreme Court of Florida adopt the majority view, that under this Court's Fourth Amendment jurisprudence, the exclusionary rule does not extend to probation revocation hearings since they are not criminal trials. *See, e.g., United States v. Armstrong, 187* F.3d 392 (4th Cir. 1999); *United States v. Bazzano*, 712 F.2d 826 (3d Cir. 1983); *Unites States v. Brown*, 488 F.2d 94 (5th Cir. 1973); *United States v. Farmer*, 512 F.2d 160 (6th Cir. 1975); *United States v. Hill*, 447 F.2d 817 (7th Cir. 1971); *United States v. Frederickson*, 581 F.2d 711 (8th Cir. 1978); *United States v. Winsett*, 518 F.2d 51 (9th Cir. 1975); *United States v. Finney*, 987 F.2d 1047 (10th Cir. 1990); *Ex parte Caffie*, 516 So.2d 831 (Ala. 1987); *State v. Sears*, 553 P.2d 907 (Alaska 1976); *State v. Alfaro*, 623 P.2d 8 (Ariz. 1980); *People v. Wilkerson*, 541 P.2d 896 (Colo. 1975); *Payne v. Robinson*, 541 A.2d 504 (Conn. 1988); *People v. Dowery*, 340 N.E.2d 529 (Ill. 1975); *Dunlin v. State*, 346 N.E.2d 746 (Ind. Ct. App. 1976); *Kain v. State*, 378 N.W.2d 900 (Iowa 1985); *Tiryung v. Commonwealth*, 717 S.W.2d 503 (Ky. Ct. App. 1986); *State v. Davis*, 375 So.2d 69 (La. 1979); *State v. Foisy*, 384 A.2d 42 (Me. 1978); *Chase v. State*, 522 A.2d 1348 (Md. 1987); *Commonwealth v. Olsen*, 541 N.E.2d 1003 (Mass. 1989); *State v. Martin*, 595 N.W.2d 214 (Minn. Ct. App. 1999); *State v. Thorsness*, 528 P.2d 692 (Mont. 1974); *State v. Field*, 571 A.2d 1276 (N.H. 1990); *State ex rel. Wright v. Ohio Adult Parole Authority*, 661 N.E.2d 728 (Ohio 1996); *State v. Spratt*, 386 A.2d 1094 (R.I. 1978); *State v. Jarman*, 987 P.2d 1284 (Utah Ct. App 1999); *Anderson v. Commonwealth*, 470 S.E.2d 862 (Va. 1996); *State v. Kuhn*, 499 P.2d 49 (Wash. Ct. App. 1972); *Panesenko v. State*, 706 P.2d 273 (Wyo. 1985).

This position was rejected in favor of the minority view that the exclusionary rule applies to probation revocation hearings. *Amiss v. State*, 219 S.E.2d 28 (Ga. Ct. App. 1975); *Wilson v. State*, 621

S.W.2d 799 (Tex. Crim. App. 1981).[2] The Court based its holding on the fact that this Court has not specifically held that the exclusionary rule does not extend to probation revocation hearings.

The dissent chastised the majority for failing to follow the unequivocal mandate of the "conformity clause" of Article I, § 12 of the Florida Constitution. The dissent recognized that the rule of law announced in *Pennsylvania Board of Probation & Parole v. Scott*, 524 U.S. 357 (1998), that the operation of the exclusionary rule does not extend beyond the criminal trial context, is applicable to Florida's probation revocation hearings and would have held that since a probation revocation hearing in not a criminal trial the exclusionary rule is inapplicable therein. The dissent concluded by stating, "I do not believe that this Court has the choice of which United States Supreme Court decisions it will follow and which it will not." [A-6].

In 1982, Article I, § 12 of the Florida Constitution, relating to search and seizure, was amended to include the "conformity clause" which requires that the rights provided by said section be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted, in all past and future decisions, by this Court. *Perez v. State*, 620 So.2d 1256 (Fla. 1993). Florida's exclusionary rule is now the federal one which exists by judicial decisions and is controlled by decisions from this Court. *Bernie v. State*, 524 So.2d 988 (Fla. 1988).

Although the Supreme Court of Florida is bound by this Court's Fourth Amendment jurisprudence, the Court rejected the Fourth Amendment principle that the exclusionary rule is not applicable to proceedings other than criminal trials. This rejection was based on the fact that this Court has not yet applied the foregoing legal principle to the precise factual scenario presented herein.

---

[2] Two other states, New Mexico in *State v. Marquart*, 945 P.2d 1027 (N.M. Ct. App. 1997) and Oregon in *State v. Rogers*, 836 P.2d 127 (Or. 1992), have ruled that under their respective state constitutions evidence unlawfully seized is inadmissible in probation revocation hearings.

The Court erroneously interpreted this Court's decisions in *United States v. Calandra*, 414 U.S. 338 (1974) (exclusionary rule does not apply to grand jury proceedings); *United States v. Janis*, 428 U.S. 433 (1976) (exclusionary rule does not bar the introduction of unconstitutionally obtained evidence in a civil tax proceeding); *I.N.S. v. Lopez-Mendoza*, 468 U.S. 448 (1984) (exclusionary rule does not apply to civil deportation proceedings) and *Pennsylvania Board of Probation & Parole v. Scott*, 524 U.S. 357 (1998) (exclusionary rule does not bar the introduction at parole revocation hearing of evidence seized in violation of parolees' Fourth Amendment rights) .

In *Janis*, this Court set forth the framework for deciding in what types of proceeding application of the exclusionary rule is appropriate. The framework requires this Court to weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs. On the benefit side is the deterrence of future unlawful police conduct. On the cost side is the loss of probative evidence and all secondary costs that flow from the less accurate or more cumbersome adjudication that occurs after probative evidence is excluded.

Most instructive herein is the weighing process this Court utilized in *Scott* when it declined to extend the exclusionary rule to parole revocation proceedings. In balancing the costs and benefits of applying the exclusionary rule in a parole revocation proceeding, this Court stated that:

> Application of the exclusionary rule would both hinder the functioning of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings. The rule would provide only minimal deterrence benefits in this context, because application of the rule in the criminal trial context already provides significant deterrence of unconstitutional searches.

524 U.S. *at* 364. This Court further found that the costs of excluding reliable, probative evidence are particularly high in the context of parole revocation proceedings because it permits the parolee, who is

more likely to commit future criminal offenses than an average citizen, to avoid his noncompliance of the terms of his parole. *Id. at* 365. Thus, based on the substantial costs and minimal deterrence effect, this Court concluded that the exclusionary rule does not bar the introduction of evidence seized in violation of a parolees' Fourth Amendment rights at a parole revocation hearing. *Id. at* 364.

In *United States v. Knights*, No. 00-1260 (U.S. Dec. 10, 2001) this Court utilized the same weighing process to determining the level of certainty required to make a search of a probationer lawful and the evidence admissible against him in a criminal trial. This Court, just as it did in the parole revocation hearings in *Scott*, recognized that recidivism rate of probationers is significantly higher than the general crime rate and that probationers have a greater incentive to conceal their criminal activities and quickly dispose of incriminating evidence because they are aware that they may be subject to revocation and possible incarceration in proceedings where trial rights of a jury and proof beyond a reasonable doubt do not apply. The Court then found that the State's interest in apprehending violators of the criminal law and the protection of potential victims of criminal enterprise outweighs the interest of the hope that the probationer will successfully complete probation and be integrated back into the community. The State's interest in apprehending violators of criminal law who are on probation is greater than it is to the ordinary citizen. Thus, the Court found that when dealing with the exclusionary rule and its applicability to probationers, the costs to society outweigh the benefits.

In accordance with *Scott* and *Knights,* this Court should explicitly extend the rule of law that the operation of the exclusionary rule does not extend to non criminal trials to probation revocation hearings. Such an extension is warranted since there is no constitutional difference between probation and parole for purposes of the Fourth Amendment. Both probationers and parolees enjoy only conditional liberty properly dependant on the observance of special conditions. *Morrissey v. Brewer*, 408 U.S. 471 (1972). The reasons this Court found in *Scott* which weighed in favor of not extending the exclusionary rule to parole revocation hearings are equally applicable to probation revocation hearings. Probation revocation hearings are

not criminal trials. *Scott* 524 *at* 364. Further, since the acts constituting a probation violation could also give rise to a criminal prosecution, the exclusionary rule's application to criminal prosecutions already deters unreasonable searches and seizures. *Id. at* 364. This is exactly what occurred in the instant case. Finally, excluding reliable probative evidence that a probationer violated the conditions of his probation by committing a criminal offense would allow the probationer to escape the consequences of his noncompliance with the terms of his probation. *Id. at* 365. Thus, this Court should explicitly hold that the operation of the exclusionary rule does not extend to probation revocation hearings.

The Fourth Circuit in *United States v. Armstrong, 187* F.3d 392 (4th Cir. 1999), the Court of Appeals of Minnesota in *State v. Martin*, 595 N.W.2d 214 (Minn. Ct. App. 1999) and the Court of Appeals of Utah in *State v. Jarman*, 987 P.2d 1284 (Utah Ct. App 1999) have all applied *Scott* to probation revocation hearings. Those courts reasoned that since there are no material distinctions between the parole and probation revocation systems, the weighing process favored not extending the exclusionary rule to probation revocation hearings.

Since both the probation and parole systems are constitutionally similar, no useful purpose would be served by not announcing the rule of law that the exclusionary rule does not extend to probation revocation hearings. As the Court just recognized in *Knights*, the State's beneficial interest in protecting its citizen from crimes that may be committed by probationers out weighs the societal costs, the decision of the Supreme Court of Florida holding otherwise is erroneous. Besides the instant decision, only the Georgia Court of Appeals and Court of Criminal Appeals of Texas have held that the Fourth Amendment's exclusionary rule extends to probation revocation hearings. The present split in authority could continue to widen without guidance from this Court. Therefore, this case warrants consideration by this Court.

CONCLUSION

Based on the foregoing reasons, the Petitioner, the State of Florida, respectfully requests that this Court grant its Petition for Writ of Certiorari to the Supreme Court of Florida and summarily reverse the Supreme Court of Florida based on the authorities herein cited.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MICHAEL J. NEIMAND
Assistant Attorney General

Office of the Attorney General
110 S.E. 6th Street - 9th Floor
Ft. Lauderdale, Florida 33301
(954) 712-4600

CASE NO.

IN THE UNITED STATES SUPREME COURT
October Term 2001

THE STATE OF FLORIDA,
Petitioner,

vs.

SHELTON SCARLET;
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

Opinion, State v. Scarlet, Supreme Court of Florida, November 1, 2001 ..... A-1

Opinion, Scarlet v. State, District Court of Appeal of Florida, Third District, August 16, 2000 ..... A-8

Order Denying the Motion to Suppress, Circuit Court of the 11th Judicial Circuit of the State of Florida in and for Dade County, Dated October 25, 1999 ..... A-12

Supreme Court of Florida

No. SC00-2135

STATE OF FLORIDA,
Petitioner,

vs.

SHELTON SCARLET,
Respondent.

[November 1, 2001]

PER CURIAM.

We have for review Scarlet v. State, 766 So. 2d 1110 (Fla. 3d DCA 2000), which expressly and directly conflicts with Johnston v. State, 768 So. 2d 504 (Fla. 4th DCA 2000). We have jurisdiction. See art. V, § 3(b)(3), Fla. Const.

The issue presented in this case is whether, in light of the United States Supreme Court's decision in Pennsylvania Board of Probation & Parole v. Scott, 524 U.S. 357 (1998), the exclusionary rule is applicable in probation revocation hearings in Florida. The State acknowledges that the Supreme Court's decision in Scott did not concern the admissibility of illegally seized evidence at a probation revocation hearing. Nonetheless, the State contends that the Supreme Court's reasons for rejecting the applicability of the exclusionary rule in parole revocation hearings are equally applicable to probation revocation hearings. In a unanimous decision in Scarlet the Third District rejected the State's argument and explained:

> The Florida Supreme Court has held that in the absence of a controlling federal decision directly on point, evidence obtained through an unlawful search is inadmissible in a probation revocation hearing. See State v. Cross, 487 So. 2d 1056 (Fla. 1986). Since then the United States Supreme Court has held that such evidence is admissible in parole revocation hearings. See Pennsylvania Parole Bd. v. Scott, 524 U.S. 357, 118 S. Ct. 2014, 141 L. Ed.2d 344 (1998). However, a parole hearing is substantively different, as it is not part of a criminal prosecution. A parole hearing is an administrative proceeding conducted by non-lawyers in a non-judicial setting; "traditional rules of evidence generally do not apply." Id. at 366, 118 S. Ct. 2014. "The exclusionary rule, moreover, is incompatible with the traditionally flexible, administrative

> procedures of parole revocation." Id. at 365, 118 S. Ct. 2014. Probation revocation hearings, however, are under the court's jurisdiction and generally lead to sentencing hearings that require the appointment of counsel. See Floyd v. Parole and Probation Comm'n, 509 So. 2d 919 (Fla. 1987). In short, parole revocation hearings and probation revocation hearings are very different proceedings.
>
> Scott does not overturn Cross. Evidence discovered during an unlawful search is not admissible in a hearing to revoke probation. See Soca v. State, 673 So. 2d 24 (Fla. 1996); Lawson v. State, 751 So. 2d 623 (Fla. 4th DCA 1999).
>
> The State asked this court to certify this question to the Florida Supreme Court. We decline to do so, as the Florida Supreme Court has spoken so clearly on this matter.

766 So. 2d at 1110-11. More recently, in Williams v. State, 791 So. 2d 37 (Fla. 2d DCA 2001), the Second District followed Scarlet and held that the exclusionary rule is applicable in a probation revocation hearing, notwithstanding the Supreme Court's decision in Scott.

We have considered but decline to revisit our prior decisions in State v. Cross, 487 So. 2d 1056 (Fla. 1986), and Grubbs v. State, 373 So. 2d 905 (Fla. 1979). Accordingly, we approve the Third District's decision in Scarlet and the Second District's decision in Williams concluding that Scott does not preclude the applicability of the exclusionary rule in probation revocation hearings, and disapprove of the Fourth District's dicta in Johnston suggesting otherwise.

It is so ordered.

SHAW, ANSTEAD, PARIENTE, and LEWIS, JJ., concur.
WELLS, C.J., dissents with an opinion, in which, HARDING and QUINCE, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

WELLS, C.J., dissenting.

I dissent because I conclude that the majority fails to follow the unequivocal mandate of article 1, section 12 of the Florida Constitution:

> **SECTION 12. Searches and seizures.**– . . . This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.

In Pennsylvania Board of Probation & Parole v. Scott, 524 U.S. 357, 362-64 (1998) (emphasis added), the court stated:

> We have emphasized repeatedly that the government's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution. See, e.g., United States v. Leon, 468 U.S. 897, 906 (1984); Stone v. Powell, 428 U.S. 465, 482, 486 (1976). Rather, a Fourth Amendment violation is "'fully accomplished'" by the illegal search or seizure, and no exclusion of evidence from a judicial or administrative proceeding can "'cure the invasion of the defendant's rights which he has already suffered.'" United States v. Leon, supra, at 906 (quoting Stone v. Powell, supra, at 540, White, J., dissenting)). The exclusionary rule is instead a

judicially created means of deterring illegal searches and seizures. United States v. Calandra, 414 U.S. 338, 348 (1974). As such, the rule does not "proscribe the introduction of illegally seized evidence in all proceedings or against all persons," Stone v. Powell, supra, at 486, but applies only in contexts "where its remedial objectives are thought most effectively served," United States v. Calandra, supra at 348; see also United States v. Janis, 428 U.S. 433, 454 (1976) ("If . . . the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted"). Moreover, because the rule is prudential rather than constitutionally mandated, we have held it to be applicable only where its deterrence benefits outweigh its "substantial social costs." United States v. Leon, 468 U.S. at 907.

Recognizing these costs, we have repeatedly declined to extend the exlusionary rule to proceedings other than criminal trials. Id. at 909; United States v. Janis, supra at 447. For example, in United States v. Calandra, we held that the exclusionary rule does not apply to grand jury proceedings; in so doing, we emphasized that such proceedings play a special role in the law enforcement process and that the traditionally flexible, nonadversarial nature of those proceedings would be jeopardized by application of the rule. 414 U.S., at 343-346, 349-350. Likewise, in United States v. Janis, we held that the exclusionary rule did not bar the introduction of unconstitutionally obtained evidence in a civil tax proceeding because the costs of excluding relevant and reliable evidence would outweigh the marginal deterrence benefits, which, we noted, would be minimal because the use of the exclusionary rule in criminal trials already deterred illegal searches. 428 U.S., at 448, 454. Finally, in INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), we refused to extend the exclusionary rule to

> civil deportation proceedings, citing the high social costs of allowing an immigrant to remain illegally in this country and noting the incompatibility of the rule with the civil, administrative nature of those proceedings. Id., at 1051.
>
> As in Calandra, Janis, and Lopez-Mendoza, we are asked to extend the operation of the exclusionary rule beyond the criminal trial context. We again decline to do so. Application of the exclusionary rule would both hinder the functioning of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings. The rule would provide only minimal deterrence benefits in this context, because application of the rule in the criminal trial context already provides significant deterrence of unconstitutional searches. We therefore hold that the federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights.

All agree that a probation revocation hearing is not a criminal trial. I do not believe that this Court has the choice of which United States Supreme Court decisions it will follow and which it will not.

HARDING and QUINCE, JJ., concur.

66666

Application for Review of the Decision of the District Court of Appeal -
Direct Conflict

Third District - Case No. 3D99-3040

(Dade County)

Robert A. Butterworth, Attorney General, and Michael J. Neimand, Assistant Attorney General, Fort Lauderdale, Florida,

for Petitioner

Bennett H. Brummer, Public Defender, and Manuel Alvarez, Assistant Public Defender, Eleventh Judicial Circuit, Miami, Florida,

for Respondent

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 2000

SHELTON SCARLET,	**	
Appellant,	**	CASE NO. 3D99-3040
vs.	**	LOWER TRIBUNAL NO. F98-29427-B
THE STATE OF FLORIDA,	**	
Appellee.	**	

Opinion filed August 16, 2000.

An Appeal from the Circuit Court for Dade County, Robert N. Scola, Jr., Judge.

Bennett H. Brummer, Public Defender, and Manuel Alvarez, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Michael J. Neimand, Assistant Attorney General, for appellee.

Before JORGENSON and SORONDO, JJ., and NESBITT, Senior Judge.

PER CURIAM.

Defendant appeals from a revocation of probation, arguing that the evidence admitted at his revocation hearing was seized in violation of the Fourth Amendment. For the following reasons, we reverse and remand.

Defendant was placed on probation for a term of one year for burglary of an occupied dwelling. An affidavit of violation of probation was filed charging defendant with committing the offense of trafficking in cocaine; failing to pay restitution; and failing to complete 100 hours of community service. The order of revocation of probation finds defendant guilty of all three violations.

The cocaine charge emanated from a traffic stop. On that charge, the trial court found the search to be without probable cause, without founded suspicion, and without a warrant or consent. Defendant alleged that the drugs were not his. At the probation violation hearing, however, the trial court admitted the seized cocaine on the ground that the exclusionary rule did not apply. The court revoked defendant's probation and sentenced him to 54 months in state prison; defendant appeals; we reverse.

The Florida Supreme Court has held that in the absence of a controlling federal decision directly on point, evidence obtained through an unlawful search is inadmissible in a probation revocation hearing. See State v. Cross, 487 So. 2d 1056 (Fla. 1986). Since then the United States Supreme Court has held that such evidence is admissible in parole revocation hearings. See Pennsylvania Parole Bd. v. Scott, 524 U.S. 367 (1998). However, a parole hearing is substantively different, as it is not part of a criminal prosecution. A parole hearing is an administrative proceeding conducted by non-lawyers in a non-judicial setting; "traditional rules of evidence generally do not apply." Id. at 366. "The exclusionary rule, moreover, is incompatible with the traditionally flexible, administrative procedures of parole revocation." Id. at 365. Probation revocation hearings, however, are under the court's jurisdiction and generally lead to sentencing hearings that require the appointment of counsel. See Floyd v. Parole and Probation Comm'n, 509 So. 2d 919 (Fla. 1987). In short, parole revocation hearings and probation revocation hearings are very different proceedings.

Scott does not overturn Cross. Evidence discovered during an unlawful search is not admissible in a hearing to revoke probation. See

Soca v. State, 673 So. 2d 24 (Fla. 1996); Lawson v. State, 751 So. 2d 623 (Fla. 4th DCA 1999).

The State asked this court to certify this question to the Florida Supreme Court. We decline to do so, as the Florida Supreme Court has spoken so clearly on this matter.

In sum, we reverse and remand for further proceedings, as it is not clear from the record that on the two remaining probation violation findings, the trial court would have revoked defendant's probation or entered the same sentence. See Largaespado v. State, 658 So. 2d 189 (Fla. 3d DCA 1995).

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. **F98-29427B**
JUDGE: SCOLA

THE STATE OF FLORIDA,

Plaintiff,

v.

SHELDON SCARLETT,

Defendant.

_____/

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND FINDING DEFENDANT IN VIOLATION OF PROBATION

The Defendant, during the course of an evidentiary hearing on a probation violation allegation, orally moved to suppress evidence seized which formed the basis for the probation violation. The court allowed the oral motion to be heard simultaneously with the probation

violation hearing. The Court held the evidentiary hearing on September 21, 1999, to determine the merits of Defendant's motion as well as the probation violation allegation.

The Defendant, while on probation for this case, was arrested by two Miami-Dade Police detectives for possession of cocaine after he was stopped for a traffic offense. One of the detectives claimed that as he approached the passenger side of the Defendant's vehicle, he saw the Defendant trying – unsuccessfully – to stuff a clear plastic bag of white powder between the center console and the passenger seat. Based upon this "plain view" observation, the Defendant was arrested.

After considering the testimony, the argument of counsel and the relevant legal authorities, the Motion to Suppress is denied[3]

This Order is divided into two (2) parts. In part A, the court sets forth its finding of fact. In Part B, the Court discusses the relevant legal authorities and makes its conclusions of law.

---

[3] The Court granted this same motion in the underlying felony case because the search violated the Fourth Amendment to the United States Constitution and Article 1, §12 of the Florida Constitution. However, because the exclusionary rule does not apply to probation violation hearings, *see Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998), the motion is denied in this matter. The State is not contesting the Court's ruling in the underlying felony case and, in fact, has already announced a *nolle prosequi* of that case.

A. FINDINGS OF FACT

At the evidentiary hearing, the Court heard testimony from detectives Danny Hurtado and Javier Rodriguez as well as from the Defendant. There were significant conflicts in the testimony of Hurtado and Rodriguez concerning the Defendant's "furtive" movements. The Defendant denied making any furtive movements. These findings of facts are culled from the credible testimony of all three witnesses who testified.

On March 25, 1999, Detective Danny Hurtado of the Miami-Dade Police Department was working a robbery intervention detail in the area of NW 95th Street and 7th Avenue. He saw the Defendant driving around in the area two times. At one point, the Defendant entered into a parking lot and made a u-turn and returned to the street. He failed to stop at a red light in the area of 95th Street. Hurtado decided to stop the Defendant for the traffic violation. His intent to stop the Defendant was not motivated by any improper racial or ethnic factors. Hurtado positioned himself behind the Defendant's vehicle. He activated his siren and the blue dashboard light (he was in an unmarked vehicle). The Defendant continued to travel for approximately one mile before stopping. During this time, the Defendant looked in his side view

mirror and could see the officer, with emergency equipment engaged, behind him. The Defendant had ample time and opportunity to secrete the small package of cocaine that was eventually found in the car.

The Defendant eventually came to a stop in the area of 85th street and was ordered out of the car. The detectives then searched his vehicle and found a bag with trafficking amount of cocaine stuffed between the center console and the passenger seat. The vehicle was a rental vehicle and was rented to someone from outside the state. The Defendant borrowed the vehicle from his auntie's boyfriend, "Buns." He claims he was going to visit his girlfriend but the court rejects that testimony as not credible.

The Defendant knew the cocaine was in the vehicle but the cocaine was not in plain view as the detectives testified. It is unreasonable to conclude that someone would allow a person without knowledge of the presence of the cocaine to take control of a vehicle with a trafficking amount of cocaine. This conclusion is confirmed by the statements the Defendant made after his arrest. When told he was under arrest for possession of the cocaine, the Defendant made the following spontaneous statements:

"The stuff is not mine." "I'm on probation; don't do this to me." "I can put you in contact with the person whose stuff it is and get more." "I know someone with lots of weight." Those statements and all the other facts and circumstances in the case establish the Defendant was in knowing possession of a trafficking amount of cocaine.

B. DISCUSSION OF LEGAL AUTHORITY AND CONCLUSION OF LAW

The court has found that the Defendant committed a traffic violation. Therefore, the vehicle was lawfully stopped. *Whren v. United States*, ___U.S.__, 116 S. Ct. 1769, 135 L.Ed.2d 89 (1996); *Holland v. State*, 696 So.2d 757 (Fla. 1997). In adopting the *Whren* standard in this state, the Florida Supreme Court noted:

> In *Whren*, the Supreme Court held that the constitutional reasonableness of a traffic stop is not dependent on the motivations of the individual officers involved and applied a simple objective test, based on the common law rule that probable cause justifies a search and seizure. 116 S. Ct. At 1774, 1777.

Holland at p. 760.

As was the case in *Holland*, the Defendant in this case committed the traffic violation of running a red light. The stop of his vehicle was, thus, lawful.

Once he was stopped for the traffic violation, the detectives ordered the Defendant to exit the vehicle. "The police may order the driver out of a vehicle that has been lawfully stopped for a traffic violation. *See Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977)." *Howell v. State*, 725 So.2d 429, 430 (Fla. 2d DCA 1999).

The court finds that the search of the vehicle was without probable cause, without founded suspicion, without a warrant, and without consent. There are no lawful exceptions to the warrant requirement that apply to this case. Thus, the search of the vehicle and the arrest of the Defendant were illegal under the Fourth Amendment to the United States Constitution and Article 1, §12 of the Florida Constitution.

The Court also finds that the spontaneous statements of the Defendant were the fruits of this illegal search and arrest and that there were no intervening circumstances to attenuate the taint of the illegal search and arrest. In *Wong Son v. United States*, 371 US 471, 9 L.Ed 441, 83 S.Ct 407 (1963), the Supreme Court of the United States held that all evidence, both physical and verbal, gathered after an illegal arrest was inadmissible in court. Twelve years later, in *Brown v.*

Illinois, 422 US 590, 45 L.Ed 416, 95 S. Ct 225 (1975), the United States Supreme Court held that if certain elements existed, their holding in *Wong Son* would not be applicable and statements made after an illegal arrest could be introduced into court as evidence. Those elements are: 1) whether *Miranda* warnings were given, 2) the temporal proximity of the arrest and the confession, 3) the presence of intervening circumstances, and 4) the purpose and flagrancy of the officer's misconduct. In applying those elements to the instant case we look first to the giving of *Miranda*. The *Brown* Court held that "[t]he Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered." *Id.* at 603, 427. In this case, the spontaneous statements of the Defendant were made **before** he was read *Miranda*. Second we look at the temporal proximity to the arrest and the statements. Testimony by the detectives established that the statements were made by the Defendant immediately after the arrest. The closeness with which the arrest and statements occurred leads directly to the third element. The third element indicates that there must be some intervening circumstance between the time of the arrest and the time that the statements are

made. The evidence clearly shows that there was no such circumstance. The Florida Supreme Court has held that things such as speaking freely to officers of another jurisdiction or state about another unrelated case, time span between the arrest and the statements, or conversations initiated by the Defendant to other inmates, would all be potential intervening events. *Voorhees v. State*, 22 Fla.L.Weekly S357, S360 (Fla. 1997). None of these intervening events are present in the instant case. Finally we look at the purpose and flagrancy of the officers misconduct. The evidence shows that the detectives' stop of the Defendant for a traffic infraction should not have resulted in a search of the Defendant's vehicle.

Because the elements required to introduce evidence gathered after an illegal arrest were not met, this court finds that the standard set forth in *Wong Son* must be applied. Therefore, this court finds that the spontaneous statements made by the Defendant are subject to exclusion from evidence at a criminal trial.

Although the Court has concluded that the search and arrest of the Defendant were illegal and that the spontaneous statements were the fruits of those illegalities, the inquiry does not end there. These findings have resulted in the exclusion of the evidence and statements

in the underlying felony trafficking in cocaine trial. However, because the Court finds that the exclusionary rule does not apply to probation violation hearings, *see Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998), the motion is denied in this matter. Under Article 1 §12 of the Florida Constitution, Florida courts are required to follow United States Supreme Court cases interpreting the Fourth Amendment.

In *Pennsylvania Board of Probation and Parole*, the United States Supreme Court was faced with the issue of whether the exclusionary rules should be applied to parole revocation hearings. The Court stated unequivocally in that case, that would again decline to extend the exclusionary rule beyond the criminal trial context. *Id.* at 2020. The Court had previously refused to extend the exclusionary rule to grand jury proceedings, see *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L.Ed.2d 561 (1974), or to civil tax proceedings, see *United States v. Janis*, 428 U.S. 433, 96 S. Ct. 3021, 49 L.Ed.2d 1046 (1976), or to civil deportation proceedings, see *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984).

The United States Supreme Court has held that because the exclusionary rule is prudential rather than constitutionally mandated,

it is applicable only where its deterrence benefits outweigh its "substantial social costs." *United States v. Leon*, 468 U.S. 897, 907, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). "Application of the exclusionary rule would both hinder the functioning of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings. The rule would provide only minimal deterrence benefits in this context, because application of the rule in the criminal trial context already provides significant deterrence of unconstitutional searches." *Pennsylvania Board of Parole*, supra. at 2020.

The U.S. Supreme Court also stated that it is of no legal consequence that the person conducting the search is a police officer rather than a parole officer.

> Where the person conducting the search is a police officer, the officer's focus is not on ensuring compliance with parole conditions or obtaining evidence for introduction at administrative proceedings, but upon obtaining convictions of those who commit crimes. The non-criminal parole proceeding 'falls outside the offending officer's zone of primary interest.' [*United States v.*] *Janis*, *supra*. at 448 (1976). Thus, even when the officer knows that the subject of a search is a parolee, the officer will be deterred from violating Fourth Amendment rights

> by the application of the exclusionary rule to criminal trials.

Pennsylvania Board of Parole at 2022.

The officers' "zone of primary interest" in this case was the trafficking in cocaine case - not this probation violation. In fact, the officers have incurred the wrath of exclusionary rule by this Court's ruling suppressing the evidence and statements in the trafficking case. That case has been *nolle prossed* by the State and the dismissal will surely deter this type of conduct in the future.

This Court sees no legal reason not to extend the rationale of *Pennsylvania Board of Parole* to a probation revocation hearing. A probation revocation hearing is not a criminal trial. In fact, the Florida Supreme Court has stated that, "[t]he purpose of a probation revocation hearing is to determine whether the terms of a defendant's probation for a prior crime have been violated. As such, a probation revocation hearing constitutes a deferred sentencing proceeding." *Green v. State*, 463 So.2d 1139 (Fla. 1985).

CONCLUSION

Based upon the foregoing grounds, the motion to suppress is denied.

The Court finds that there is sufficient evidence to believe the Defendant violated his probation by knowingly possessing a trafficking amount of cocaine. This finding is based, in part on the Defendant's spontaneous statements.

The Defendant has thirty days to appeal.

Done and ordered this 25th day of October, 1999 in Miami, Dade County, Florida.

_____
ROBERT N. SCOLA, JR.
DADE CIRCUIT COURT JUDGE

cc: Bruce Jacobs, ASA
Mitchell Wallick, APD

KW

ORIGINAL (2)

Supreme Court, U.S.
FILED
FEB 1 2002
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

CASE NO. 01-931

THE STATE OF FLORIDA,

Petitioner,

vs.

SHELTON SCARLET,

Respondent.

ON PETTION FROM WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

Bennett H. Brummer
Public Defender
Eleventh Judicial Circuit of Florida

Andrew Stanton
Assistant Public Defender
Counsel of Record
1320 N.W. 14th Street
Miami, Florida 33125
Telephone: (305) 545-1960

Manuel Alvarez
Assistant Public Defender

20 pp

QUESTION PRESENTED

Where the Florida Supreme Court's decision was based exclusively on two prior opinions by that court which interpreted the scope of an article of the state constitution, should certiorari be denied as this Court has always recognized that judgments by the highest court of a state as to the meaning and effect of its own constitution are decisive and controlling?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING WRIT 5

THE FLORIDA SUPREME COURT'S DECISION WAS BASED EXCLUSIVELY ON TWO PRIOR OPINIONS BY THAT COURT WHICH INTERPRETED THE SCOPE OF AN ARTICLE OF THE STATE CONSTITUTION. CERTIORARI SHOULD THEREFORE BE DENIED AS THIS COURT HAS ALWAYS RECOGNIZED THAT JUDGMENTS BY THE HIGHEST COURT OF A STATE AS TO THE MEANING AND EFFECT OF ITS OWN CONSTITUTION ARE DECISIVE AND CONTROLLING.

CONCLUSION 15

TABLE OF AUTHORITIES

CASES **PAGE**

Cuciak v. State,
410 So. 2d 916 (Fla. 1982) 10

Floyd v. Parole and Probation Commission,
509 So. 2d 919 (Fla. 1987) 8, 9

Gagnon v. Scarpelli,
411 U.S. 778 (1973) 10

Griffin v. Wisconsin,
483 U.S. 868 (1987) 10, 11, 13

Grubbs v. State,
373 So. 2d 905 (Fla. 1979) 7, 10, 11

Highland Farms Dairy v. Agnew,
300 U.S. 608 (1937) 6

Holmes v State,
448 So. 2d 1070 (Fla. 1st DCA 1984) 9

Minnesota v. National Tea Co.,
309 U.S. 551 (1940) 6, 14

Pennsylvania Bd. of Probation and Parole v. Scott,
524 U.S. 357 (1998) 5-8, 13, 14

PruneYard Shopping Ctr. v. Robins,
447 U.S. 74 (1980) 6

Reatz v. State,
677 So. 2d 963 (Fla. 3d DCA 1996) 10

Soca v. State,
673 So. 2d 24 (Fla.), *cert. denied,* 519 U.S. 910 (1996) 5, 7, 10, 11, 13

State v. Cross,
487 So. 2d 1056 (Fla.), *cert. dismissed,* 479 U.S. 805 (1986) 7

State v. Lavazzoli,
434 So. 2d 321 (Fla. 1983) 7

State v. Scarlet,
800 So. 2d 220 (Fla. 2001) 5, 13, 14

United States v. Pierre,
47 F.3d 241 (7th Cir. 1995) 10

STATUTES

§ 947.23, FLA. STAT. (2000) 9

§ 947.23(6)(a) FLA. STAT. (2000) 9

28 U.S.C. § 1257(a) 1

FLORIDA CONSTITUTION

Article I, Section 12 ..... 5-7, 14

OTHER AUTHORITIES

FED. R. EVID. 1101(d)(3) 10

JURISDICTION

The petitioner relies on 28 U.S.C. § 1257(a), as the basis for jurisdiction in this case. However, 28 U.S.C. § 1257(a), is not applicable because the Florida Supreme Court's decision in *State v. Scarlet,* 800 So. 2d 220 (Fla. 2001), was premised solely on its interpretation of article I, section 12 of the Florida constitution and no "title, right, privilege, or immunity" was "specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authorized under, the United States."

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 12 of the Florida Constitution, which provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

Mr. Scarlet was placed on probation for a term of one year for burglary. While on probation, he was detained by the police and his car was illegally searched. The search revealed a trafficking amount of cocaine. The trial judge found that the warrantless search was unsupported by probable cause, reasonable suspicion, or consent and thus suppressed the evidence with respect to the trial on the substantive drug offense. The trial court, however, admitted the evidence at the probation revocation hearing on the authority of *Pennsylvania Bd. of Probation and Parole v. Scott,* 524 U.S. 357 (1998), and subsequently sentenced Mr. Scarlet to a 54 month term of incarceration for violating his probation.

The Third District Court of Appeal, relying on the Florida Supreme Court's interpretation of article I, section 12 of the state constitution, reversed the probation revocation order. *See State v. Cross,* 487 So. 2d 1056 (Fla. 1986); *State v. Soca,* 673 So. 2d 24 (Fla. 1996). The appellate court based its decision on established Florida precedents construing the conformity clause of article I, section 12. The Florida Supreme Court has stated that United States Supreme Court Fourth Amendment decisions must be directly on point, otherwise Florida may grant greater protection to its citizens than the federal constitution requires. *See State v. Soca,* 673 So. 2d 24. The appellate court held that *Scott* did not control the outcome of this case because

Scott involved a parole violation proceeding, which differed significantly from probation violation hearings in Florida.

> The Florida Supreme Court has held that in the absence of a controlling federal decision directly on point, evidence obtained through an unlawful search is inadmissible in a probation revocation hearing. *See State v. Cross,* 487 So. 2d 1056 (Fla.1986). Since then the United States Supreme Court has held that such evidence is admissible in parole revocation hearings. *See Pennsylvania Parole Bd. v. Scott,* 524 U.S. 357, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998). However, a parole hearing is substantively different, as it is not part of a criminal prosecution. A parole hearing is an administrative proceeding conducted by non-lawyers in a non-judicial setting; "traditional rules of evidence generally do not apply." *Id.* at 366, 118 S.Ct. 2014. "The exclusionary rule, moreover, is incompatible with the traditionally flexible, administrative procedures of parole revocation." *Id.* at 365, 118 S.Ct. 2014. Probation revocation hearings, however, are under the court's jurisdiction and generally lead to sentencing hearings that require the appointment of counsel. *See Floyd v. Parole and Probation Comm'n,* 509 So. 2d 919 (Fla.1987). In short, parole revocation hearings and probation revocation hearings are very different proceedings.

Scarlet v. State, 766 So. 2d 1110, 1111 (Fla. 3d DCA 2000). The Florida Supreme Court agreed with the Third District's holding and affirmed the decision on the basis of state constitutional jurisprudence with respect to the meaning of article I, section 12 of the Florida constitution. *State v. Scarlet,* 800 So. 2d 220 (Fla. 2001).

REASONS FOR DENYING THE WRIT

THE FLORIDA SUPREME COURT'S DECISION WAS BASED EXCLUSIVELY ON TWO PRIOR OPINIONS BY THAT COURT WHICH INTERPRETED THE SCOPE OF AN ARTICLE OF THE STATE CONSTITUTION. CERTIORARI SHOULD THEREFORE BE DENIED AS THIS COURT HAS ALWAYS RECOGNIZED THAT JUDGMENTS BY THE HIGHEST COURT OF A STATE AS TO THE MEANING AND EFFECT OF ITS OWN CONSTITUTION ARE DECISIVE AND CONTROLLING.

The Florida Supreme Court's decision in *State v. Scarlet*, 800 So. 2d 220 (Fla. 2001), is not subject to certiorari review because it did not involve any federal constitutional issues. The Florida Supreme Court's holding rested exclusively on its prior construal of the conformity clause of article I, section 12, of the Florida constitution and not on a Fourth Amendment interpretation. Florida has held that the conformity clause of the state constitution requires that United States Supreme Court Fourth Amendment decisions be directly on point before Florida will grant less protection to its citizens than state law would otherwise entail. *See Soca v. State,* 673 So. 2d 24 (Fla.), *cert. denied,* 519 U.S. 910 (1996). In *Scarlet,* the Florida Supreme Court held that *Pennsylvania Bd. of Probation and Parole v. Scott,* 524 U.S. 357 (1998), did not apply to probation revocation hearings because *Scott* involved a parole revocation hearing. Parole and probation revocation hearings in Florida are substantially different kinds of proceedings. In light of Florida's strict interpretation

of the conformity clause, therefore, it was apparent that *Scott* did not extend to Florida probation revocation hearings as a matter of state constitutional construction. *See, e.g., PruneYard Shopping Ctr. v. Robins,* 447 U.S. 74, 81 (1980) (noting that state courts are free to interpret their state constitutions to provide greater protection than the federal constitution).

This Court has long held that the highest state court enjoys the sole authority to interpret the "meaning and effect" of its own constitution. *Highland Farms Dairy v. Agnew,* 300 U.S. 608 (1937); *see also, Minnesota v. National Tea Co.,* 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."). The Florida Constitution permits the state courts to grant greater protection from unreasonable searches and seizures than provided by the Fourth Amendment. In Florida, searches and seizures are governed by article I, section 12 of the state constitution. As amended in 1982, article I, section 12, contains the following language:

> This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

This provision does not place the Florida constitution in strict conformity with the

Fourth Amendment, however. The Florida Supreme Court has held that the state constitutional rights are only affected by decisions of this Court which are directly on point: "[I]n the absence of a controlling U.S. Supreme Court decision, Florida courts are still 'free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal constitution.'" *Soca v. State*, 673 So. 2d 24, 26 (Fla. 1996), *quoting State v. Lavazzoli*, 434 So. 2d 321, 323 (Fla. 1983). The holding in *Scarlet* thus rests on the Florida Supreme Court's interpretation of the meaning of the Florida constitution.

In Florida, it has already been decided that under article I, section 12 the exclusionary rule applies to probation revocation hearings. *See Grubbs v. State,* 373 So. 2d 905 (Fla. 1979); *State v. Cross,* 487 So. 2d 1056 (Fla.), *cert. dismissed*, 479 U.S. 805 (1986). Florida has also determined that there are important differences between parole revocation hearings and probation revocation hearings. *See Floyd v. Parole and Probation Commission,* 509 So. 2d 919 (Fla. 1987). It follows that since *Scott* involved a parole revocation proceeding, it was not directly on point and therefore could not control the outcome in this case, as a matter of state constitutional construction.

In *Scott,* the Court premised its holding, in part, on the informal nature of parole revocation hearings, which the Court characterized as "flexible,"

"nonadversarial," and "administrative." The majority concluded that the exclusionary rule would not function well within such an informal context. *Scott,* 524 U.S. at 365-67. The Court also expressed its reluctance to intrude on the states and thus allowed them great freedom to adopt relaxed parole revocation procedures that best suited their needs. *Id.*

> We have long been averse to imposing federal requirements upon the parole systems of the States. A federal requirement that parole boards apply the exclusionary rule, which is itself a "'grud[g]ingly taken medicament,'" would severely disrupt the traditionally informal, administrative process of parole revocation. The marginal deterrence of unreasonable searches and seizures is insufficient to justify such an intrusion. We therefore hold that parole boards are not required by federal law to exclude evidence obtained in violation of the Fourth Amendment.

Scott, 524 U.S. at 369 (citation omitted).

Under Florida constitutional jurisprudence, *Scott* cannot be expanded to probation violation hearings because it specifically dealt with a parole revocation proceeding. Florida recognizes several important disparities between probation and parole revocation hearings. In *Floyd,* 509 So. 2d 919, for example, the Florida Supreme Court considered whether a parolee is entitled to court appointed counsel at a parole revocation proceeding. The Court determined that the right to counsel did not exist because of the substantive differences between parole and probation.

Revocation of parole is not part of a criminal prosecution, and thus the

> full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. While there are similarities in probation and parole, there are also some significant differences.
>
> Probation is under the jurisdiction of the courts, and it was in the exercise of our authority over the court system that we determined in [*State v. Hicks,* 478 So. 2d 22 (Fla. 1985)] that counsel must be furnished in all probation revocation hearings. Parole is administered by the Commission. Moreover, parole revocation proceedings are conducted by nonlawyers. Requiring that counsel be furnished in every case would inevitably lead to the use of counsel by the state. As noted in *Gagnon* [*v. Scarpelli*, 411 U.S. 778 (1973)] the decision-making process would be prolonged and the financial cost to the state would be substantial. Finally, unlike probation revocation, parole revocation does not lead to a sentencing hearing which necessarily requires the appointment of counsel.

Id. at 920. Pursuant to section 947.23, Florida Statutes (2000), a parole revocation is determined in an administrative, extra-judicial setting by non-lawyers. The hearing is not adversarial in nature, unlike probation revocation hearings. A commission, which usually consists of three or more commissioners, receive evidence and "[i]f the hearing was conducted by three or more commissioners, a majority of them shall enter an order determining whether the charges of parole violation have been sustained, based on the findings of fact made by them." § 947.23(6)(a) FLA. STAT. (2000).

Florida probation is considered an integral part of the criminal prosecution. Therefore, probation revocation hearings are "trial-like adversarial proceeding[s]" where probationers enjoy the right to counsel. *Holmes v State,* 448 So. 2d 1070, 1074

(Fla. 1st DCA 1984). Probationers may avail themselves of the discovery process (including the right to take depositions), *Cuciak v. State,* 410 So. 2d 916 (Fla. 1982), and traditional rules of evidence, although exercised with less rigidity, apply. *See Reatz v. State,* 677 So. 2d 963 (Fla. 3d DCA 1996). By contrast, in federal probation revocation hearings, the rules of evidence do not apply, since probation is considered civil in nature. *See* FED. R. EVID. 1101(d)(3); *United States v. Pierre,* 47 F.3d 241, 242 (7th Cir. 1995). Also, federal probationers do not enjoy an automatic right to counsel. *See Gagnon v. Scarpelli,* 411 U.S. 778, 790 (1973) (the Court found "no justification for a new inflexible constitutional rule with respect to the requirement of counsel," and held that "the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system.")

In *Soca,* 673 So. 2d 24, the Florida Supreme Court rejected the applicability of *Griffin v. Wisconsin,* 483 U.S. 868 (1987), which held that evidence seized by a probation officer during a warrantless search of the defendant's home, on less than probable cause, could be admitted in a criminal prosecution. The Court held that the rule it had established in *Grubbs,* 373 So. 2d 905, which allowed probation officers to search a probationer's residence on reasonable grounds provided that any evidence derived therefrom could only be used in a violation hearing, arose from state law. The

Grubbs rule had since been codified in the Department of Corrections operational manual and formed part of the regulatory scheme by which the state supervised probationers. *Soca,* 673 So. 2d at 27. The Wisconsin statute, on which *Griffin* was based, placed probationers in the custody of the department of health and social services and contemplated a supervisory framework which was different from Florida's scheme.

> [W]e reject the State's argument, as well as the district court's conclusion, that Florida's statutory scheme regulating probation supervision, sections 948.03 and 948.06, Florida Statutes (1995), is sufficiently analogous to the Wisconsin regulation at issue in *Griffin v. Wisconsin,* 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987), so as to make the holding in Griffin controlling here. In *Griffin*, the U.S. Supreme Court upheld a search of a probationer's residence, stating, "The search of Griffin's residence was 'reasonable' within the meaning of the Fourth Amendment because it was conducted pursuant to [Wisconsin's] valid regulation governing probationers." *Id.* at 880, 107 S.Ct. at 3172. The Wisconsin law in question there put probationers in the legal custody of the State Department of Health and Social Services and specifically rendered them "subject ... to ... conditions set by the court and rules and regulations established by the department." WIS. STAT. § 973.10(1) (1985-86). One of the Department's regulations explicitly permitted any probation officer to search a probationer's home without a warrant as long as his supervisor approved and as long as there were "reasonable grounds" to believe contraband was present--including any item that the probationer was not allowed to possess under the probation conditions. WIS. ADMIN. CODE HSS §§ 328.21(4), 328.16(1)(Dec. 1981). Wisconsin's rule provided that the officer should consider a variety of factors in determining whether "reasonable grounds" existed, among which were information provided by an informant, the reliability and specificity of that information, the reliability of the informant (including whether the informant had any

incentive to supply inaccurate information), the officer's own experience with the probationer, and the "need to verify compliance with rules of supervision and state and federal law." *Id.* § 328.21(7). Another regulation made it "a violation of the terms of probation to refuse to consent to a home search." *Griffin*, 483 U.S. at 870-71, 107 S.Ct. at 3167.

Unlike Wisconsin's statutory scheme, *see* WIS. ADMIN. CODE HSS §§ 328.21(4), 328.16(1) (Dec. 1981), Florida's statutes contain no scheme expressly authorizing or regulating the authority of probation officers or supervisors to conduct a probationary search when it is supported by "reasonable grounds." Rather, a probation officer's right to search is based on our holding in *Grubbs*, wherein we expressly limited the use of the fruits of such a search to probation proceedings. Accordingly, we find that the instant case is clearly distinguishable from *Griffin*, and under *Grubbs* the evidence obtained in the probationary search of Soca's trailer is not admissible against him in a new criminal proceeding.

As this case illustrates, the *Grubbs* rule regulating probationary searches and the admissibility of evidence discovered therein has served as a workable framework for the DOC for over sixteen years, and we believe it remains a sound policy today. There has been no demonstration that our decision in *Grubbs* does not represent a proper balancing of the need to maintain effective supervision and control over probationers with the long-held constitutional right of each citizen to be free from searches and seizures which violate the principles of article I, section 12, of the Florida Constitution.

The *Grubbs* rule gives the State considerable leeway in investigating and monitoring probationers. When the State believes that a probationer is engaging in criminal behavior, the State may choose to inform probation officials of his alleged criminal conduct and place further responsibility for investigating his conduct with those officials. Apprised of this information, the probation supervisor may exercise his or her authority to search the probationer's person or residence for evidence that the probationer is violating the terms of his

> probation. Should the probation supervisor discover such evidence, it can be used against the probationer in a probation revocation proceeding.
>
> On the other hand, the State may choose to continue its investigation and attempt to secure a warrant to search the probationer's residence in compliance with traditional search and seizure standards under article I, section 12, of the Florida Constitution. The State may also utilize the fact that the subject of its investigation is on probation as part of the circumstances establishing the probable cause necessary to secure a warrant.

Soca, 673 So. 2d 27-28 (footnote omitted). Based on the differences between Wisconsin's probationary framework and that of Florida, the Florida Supreme Court concluded that the conformity clause barred the adoption of *Griffin* and this Court subsequently denied review.

In this case, the petitioner espouses a Procrustean equivalence between the factual substrata of *Scott* and *Scarlet*. The petitioner's assertions in its application for review, however, concede that *Scott* is inapplicable based on Florida's interpretation of its own constitution. The petitioner admits that the Florida Supreme Court "based its holding on the fact that this Court has not specifically held that the exclusionary rule does not extend to probation revocation hearings." BRIEF OF PETITIONER at 9. The petitioner then goes on to urge the Court to "*extend* the rule of law that the operation of the exclusionary rule does not extend to non-criminal trials to probation hearings." BRIEF OF PETITIONER at 11 (emphasis added). The petitioner thus

acknowledges that *Scott* only addressed the question of the exclusionary rule in the context of parole violation hearings and that this Court has not expanded *Scott* to probation revocation hearings.

The Florida Supreme Court appropriately decided that Mr. Scarlet's case was controlled by settled precedents of state constitutional construction with respect to article I, section 12. Moreover, *Scarlet* is not in conflict with *Scott*, or any other federal decisions, because they are not authoritative with respect to how the Florida Supreme Court construes the state constitution. Therefore, this Court should reject certiorari in this case on the fundamental principle that state courts are free to interpret their own constitutions. *See Minnesota v. National Tea Co.*, 309 U.S. at 557.

CONCLUSION

The decision below constitutes an exercise of the Florida Supreme Court's authority to interpret the meaning and effect of the Florida constitution and not a determination of federal constitutional jurisprudence. This Court should, therefore, deny the Petition for Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida

By: _____
ANDREW STANTON
Assistant Public Defender
Counsel of Record
1320 N.W. 14th Street
Miami, Florida 33125

By: _____
MANUEL ALVAREZ
Assistant Public Defender